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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1962

No. 348

EVELYN LUNDBERG, Administratrix of the Estate of Stanley A. Lundberg, Deceased,

Petitioner,

v.

ROSE FUEL & MATERIALS, INCORPORATED,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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INDEX

Constitutional Provisions, Statutes and Court Rules Involved 1
Question Presented for Review 4
Statement of the Case 4
Summary of Argument 4
Argument 5
Conclusion 14

Citations

Cases: *Page*

American Construction Co. v. Jacksonville, T. & K. W. R. Co. (1891), 148 U.S. 372, 383, 37 L.Ed. 486, 491 6
Anderson v. Abbott, 321 U.S. 349, 356, 88 L.Ed. 793, 799 7
Bass v. Dehner (C.C.A. 10th 1939), 103 F.2d 28 ..... 10, 11, 12
Boehmer v. Penn. R. R. Co., 252 U.S. 496, 64 L.Ed. 680, 684 7
Chicago B. & Q. R. Co. v. Chicago, 166 U.S. 226, 246, L.Ed. 979 13
Erie R. R. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) 7
First Unitarian Society of Chicago v. Faulkner, 91 U.S. 415, 23 L.Ed. 283 13
Freeport Motor Casualty Co. v. Chapin, 131 Ind. App. 362, 170 N.E.2d 819 (1960) 8
Gamble v. Lewis, 227 Ind. 455, 85 N.E.2d 629, 633 (1949) 6, 8, 9
Harris v. Penn. Railroad Co. (1959), 361 U.S. 15, 4 L.Ed.2d 1, 80 S.Ct. 22 7

Home Insurance Company v. Consolidated Bus Lines (C.C.A. 4th 1950), 179 F.2d 768, 772 ..... 11, 12
Klas v. Yellow Cab Co. (C.C.A. 7th 1939), 106 F.2d 935 12
Lee v. Terminal Transport Co. 7th Circuit 269 F.2d 97, 99 (1959) 9
Lustine-Nicholson Motor Company v. Petzal (U.S. C.A. D.C. 1959), 268 F.2d 893 ..... 10, 12
Luther v. Maple (C.C.A. 8th 1958), 250 F.2d 916 12
N.Y.C. R.R. Co. v. Verkins, 125 Ind.App. 320, 122 N.E.2d 141, on pet. for rehearing 122 N.E.2d 738 (1954) 8
Palmer v. Hoffman (1943), 318 U.S. 109, 118, 87 L.Ed. 645 7
Partlow v. Goldstein (C.C.A. 8th 1959), 263 F.2d 169 12
Rogers v. Missouri Pacific R. Co., 352 U.S. 500, 1 L.Ed. 493 (1957) 7
Steele v. General Mills, 329 U.S. 433, 438, 91 L.Ed. 402, 407 7
U.S. v. Bayer, 331 U.S. 532, 67 S.Ct. 1394, 91 L.Ed. 1654 13

Constitutional Provisions, Statutes, Rules:

United States Constitution, Amendment VII 1, 10
Rule 61, Federal Rules of Civil Procedure 1
Title 28, U.S.C., Section 2111 ..... 2, 13
Burns Indiana Stat., Section 47-2010 (1961 Supp.) .. 2, 6
Burns Indiana Stat., Section 47-2011 (1952 Repl.) .. 3, 6

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CONSTITUTIONAL PROVISIONS, STATUTES AND COURT RULES INVOLVED

United States Constitution, Amendment VII:

"*Trial by jury in civil cases.*—In suits at common law where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law."

Rule 61, Federal Rules of Civil Procedure:

"*Harmless error.*—No error in either the admmission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by

the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.".

Title 28, U.S.C., Section 2111:

"*Harmless error.*—On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." (June 25, 1948, c. 646, § 1, as added May 24, 1949, c. 139, § 110, 63 Stat. 105.)

Burns Indiana Stat., Section 47-2010 (1961 Supp.):

"*Drive on right side of roadway—Overtaking and passing.*—Upon all roadways of sufficient width, a vehicle shall be driven upon the right half of the roadway except as follows:

1. When overtaking and passing another vehicle proceeding in the same direction under the rules governing such movement;

2. When the right half of a roadway is closed to traffic (while) under construction or repair;

3. Upon a roadway divided into three (3) marked lanes for traffic under the rules applicable thereon; or

4. Upon roadway designated and sign-posted for one-way traffic.

5. Upon all roadways any vehicle proceeding at less than the normal speed of traffic at the time and place under the conditions then existing shall be driven in the right-hand lane then available for traffic or as close as

practicable to the right-hand curb or edge of the roadway, except when overtaking and passing another vehicle proceeding in the same direction or when preparing for a left turn at an intersection or into a private road or driveway." (Acts 1939, ch. 48, § 1, p. 289; 1955, ch. 76, § 3, p. 158.)

Burns Indiana Stat., Section 47-2011 (1952 Repl.):

"*Passing vehicles proceeding in opposite directions.*— Drivers of vehicles proceeding in opposite directions shall pass each other to the right and upon roadways having width for not more than one (1) line of traffic in each direction, each driver shall give to the other at least one-half ($\frac{1}{2}$) of the main traveled portion of the roadway as nearly as possible." (Acts 1939, ch. 48, § 62, p. 289.)

QUESTION PRESENTED FOR REVIEW

Petitioner urges one question for review; whether prejudicial error resulted from the trial judge's refusal to instruct on the question of the duty of Respondent's driver to maintain a proper lookout. Petitioner claims such refusal violated her constitutional right to jury trial under the Seventh Amendment.

STATEMENT OF THE CASE

This is a diversity action for damages for alleged wrongful death resulting from a head-on collision between motor vehicles operated by petitioner's deceased husband and the Respondent's truck driver. The accident occurred on an open two lane highway in northern Indiana at night time. Admittedly, the truck driver was partially to the left of center line at the time of impact, but he claimed, and the jury so found, by answers to interrogatories, that immediately before the accident he was in his proper lane and swerved to his left in an unsuccessful effort to avoid a head-on collision with the deceased who was on the wrong side of the highway.

The petitioner offered no evidence tending to explain or excuse the fact that immediately before the collision her husband was driving to the left of the center line. The jury entered a verdict for the defendant-respondent, consistent with its special findings of fact, upon which judgment was entered by the District Court, which was affirmed by the Seventh Circuit Court of Appeals. *Lundberg* v. *Rose Fuel & Materials, Inc.*, 302 F. 2d 825 (1962).

SUMMARY OF ARGUMENT

1. The trial court's refusal to instruct upon the subject of the duty to maintain a lookout was "inconsequential"

because the jury decided decedent's car was on the wrong side of the road "immediately" before the accident, thereby creating an emergency in which respondent's driver had to respond.

2. The questions involved were properly decided and are not of such gravity and general importance as to require granting of certiorari by this court.

3. Jurisdiction is based upon diversity and the questions for decision are factual and involve only interpretation of Indiana Law, by which the Court is bound.

4. The trial court properly refused to instruct upon the subject of lookout for the reason that there was no evidence in the record and no special issue made by the pleadings creating such an issue.

5. The error, if any, on failure to instruct upon the subject of lookout was harmless because the deceased, being on the wrong side of the road without justifiable excuse immediately prior to the accident was guilty of contributory negligence as a matter of Indiana Law.

6. The jury was fully and fairly instructed upon petitioner's "theory" of the case.

7. The decision of the Court of Appeals is not in conflict with decisions of other circuits or of this Court.

ARGUMENT

(a) The error, if any, in failing to instruct on lookout was harmless since the evidence established that respondent's driver acted in an emergency negligently created by the deceased.

The majority opinion of the Seventh Circuit Court of

Appeals held there was error in failing to give the instruction on lookout but also held that such error was not prejudicial and "did not affect a substantial right of plaintiff." It was pointed out that the jury was properly instructed that "a person who drives on the wrong side of a highway is guilty of negligence unless he shows some justification or excuse. Burns Ind. Stat. Sec. 47-2010 (1961 Supp.); *Gamble* v. *Lewis*, 227 Ind. 455, 85 N.E. 2d 629, 633 (1949)." See also Sec. 47-2011; Burns Ind. Stat. (1952 Repl.). Judge Kiley, who wrote the opinion, also pointed out, page 826 of 302 F. 2d, that the jury gave greater credibility to the truck driver's testimony (which was strongly supported by other evidence) to the effect that he turned to his left immediately before the collision to avoid a head-on collision with the decedent's car, than they gave to petitioner's evidence. Judge Kiley concluded:

> "This being so, the question of 'proper lookout' is inconsequential. That theory of negligence presupposes that the truck driver did not see decedent's car in the south bound lane and veered into it without 'justification or excuse.' But the jury decided decedent's car was not in the south bound lane as the truck driver, in a quick response to the emergency decedent created, also turned into that lane."

(b) **There are no questions involved of such importance to justify certiorari.**

It is, of course, fundamental that the review of a judgment of the Circuit Court of Appeals by certiorari is to be exercised sparingly and only in cases (1) of gravity and general importance or (2) in order to secure uniformity of decision. *American Construction Co* v. *Jacksonville, T. & K. W. R. Co.* (1891), 148 U.S. 372, 383, 37 L.Ed. 486, 491.

(c) Factual and local questions only being involved, the Federal Court of Appeals should not intervene.

Where the jurisdiction of the Federal Court is dependent upon diversity of citizenship and where the question involves an application of the law of the state, the judgment of the District Court, concurred in by the Circuit Court of Appeals, should be considered final and not disturbed unless there is a plain showing of prejudicial error. *Palmer* v. *Hoffman* (1943), 318 U.S. 109, 118, 87 L.Ed. 645, 652; *Steele* v. *General Mills*, 329 U.S. 433, 438, 91 L.Ed. 402, 407; *Anderson* v. *Abbott*, 321 U.S. 349, 356, 88 L.Ed. 793, 799; *Boehmer* v. *Penn. R.R. Co.*, 252 U.S. 496, 64 L.Ed. 680, 684. The substantive law of Indiana governs. *Erie R.R.* v. *Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).

In at least two recent F.E.L.A. cases, this court has emphasized the importance of jury verdicts as the final determination of the facts in litigation. In *Rogers* v. *Missouri Pacific R. Co.*, 352 U.S. 500, 1 L.Ed. 2d 493 (1957), at page 510 of the U.S. Reporter, the court said:

> "Special and important reasons for the grant of certiorari in these cases are certainly present when lower federal and state courts persistently deprive litigants of their right to a jury determination."

In *Harris* v. *Pennsylvania Railroad Co.* (1959), 361 U.S. 15, 4 L.Ed. 2d 1, 80 S.Ct. 22, at page 15 of the U.S. Reporter, it was said:

> "We hold that the proofs justified with reason the jury's conclusion embodied in answers to interrogatories to the jury numbered I and II, that the employer's negligence played a part in producing the petitioner's injury."

The basic fallacy in petitioner's reasoning is the apparent assumption that the giving of an instruction on the duty to maintain proper lookout would have influenced the jury's findings of fact relative to which driver was on the wrong side of the road. Obviously, the giving, or the failure to give, such an instruction could not have influenced the jury's determination of this or any other fact. The jury's findings of fact are properly based upon the evidence and not upon the instructions.

(d) **There was no issue on lookout made by the pleadings or evidence.**

Actually, as Judge Hastings of the Seventh Circuit pointed out in his separately written opinion at 302 F. 2d 825, 826:

> "The instruction with respect to lookout should not have been given for the reason that there is no evidence in the record and no special issue raised by the pleadings tendering the issue of 'reasonable lookout' for the jury to pass upon. This was well settled in Indiana in *N.Y.C. R.R. Co.* v. *Perkins*, 125 Ind. App. 320, 122 N.E. 2d 141, on petition for rehearing, 122 N.E. 2d 738 (1954). Indeed, in that case the court held it reversible error to deny an instruction withdrawing the issue of lookout from the jury."

(e) **Petitioner's deceased was guilty of contributory negligence as a matter of Indiana law.**

The Indiana cases make it clear that a person who drives on the wrong side of a highway is guilty of negligence unless he shows justification or excuse, *Gamble* v. *Lewis*, 227 Ind. 455, 85 N.E. 2d 629, 633 (1949); *Freeport Motor Casualty Co.* v. *Chapin*, 131 Ind.App. 302, 170 N.E. 2d 698 (1960).

Petitioner's failure to produce evidence showing justifiable excuse for being on the wrong side of the highway at the time of the accident constituted contributory negligence as a matter of law in Indiana. *Gamble* v. *Lewis*, 227 Ind. 455, 85 N.E. 2d 629, 634; *Lee* v. *Terminal Transport Co.*, 7th Circuit 269 F. 2d 97, 99 (1959).

Obviously, therefore, the error involved, if any in failure to instruct the jury on the law of lookout was harmless, since the facts found by the jury, as evidenced by their answers to interrogatories, established that the deceased was guilty of negligence as a matter of Indiana law. In a case factually in point, the Supreme Court of Indiana has said:

> "We believe that when the appellee drove to his left of the center of State Road No. 38, it was prima facie evidence of negligence. There is no evidence in the record, or any reasonable inference from any evidence which would excuse such conduct, and, therefore, *as a matter of* law we must hold that he is guilty of negligence. The *only reasonable inference* from such conduct and the facts in this appeal is that such negligence was *a proximate cause* of the collision; hence the verdict was not sustained by sufficient evidence and was contrary to law." (Emphasis ours.) *Gamble* v. *Lewis*, 227 Ind. 455, 85 N.E. 2d 629, 634.

Clearly therefore, the basic issues involved in this petition pertain exclusively to interpretation and application of local Indiana law and are not of such gravity or general importance as to justify consideration by the Supreme Court of the United States. Petitioner, in reality, seeks re-examination of facts found by the jury. This cannot be done by certiorari or appeal to this court under the authorities previously cited.

Petitioner's rights under the Seventh Amendment to the Constitution were not infringed by the action of the trial court in failing to instruct the jury on the legal duty to maintain "proper lookout" as petitioner now argues for the first time without benefit of supporting authority. Petitioner's assertions run afoul of the clear intent of the language of the Seventh Amendment that:

> "*No fact tried by a jury shall be otherwise reexamined in any court of the United States,* than according to the rules of the common law." (Emphasis added.)

Petitioner would have the Court of Appeals or this court substitute its judgment of what the facts were, as revealed by the evidence, rather than accept the general verdict and special findings of the jury which clearly indicate the negligence of the petitioner's decedent. Prejudicial error does not result, nor are constitutional rights denied, by a refusal to give a particular instruction where it is inapplicable, or where facts found by the jury can lead to but one result. This is convincingly illustrated in *Bass* v. *Dehner* (C.C.A. 10th 1939), 103 F. 2d 28, pp. 31, 33 and 34, and stated aptly by the court in *Lustine-Nicholson Motor Company* v. *Petzal*, (U.S.C.A. D.C. 1959), 268 F. 2d 893, at page 895:

> "Appellant next argues that the District Court erred in denying a requested instruction on the doctrine of assumption of risk. This instruction would be relevant only if the jury accepted the appellant's theory of the case."

(f) The jury was properly instructed on petitioner's theory of the case.

The petitioner complains of failure of the trial judge to instruct the jury on her theory of the case but that was not

true. Petitioner's Instructions Nos. 6A, 7 and 8 and respondent's Instruction No. 6 (Appellant's Appendix, pp. 10 to 12) fully and fairly informed the jury of the law applicable to driving to the left of center of the highway, which was the charge made by petitioner against the respondent and the real "theory" of petitioner's case. The jury determined the issue adversely to petitioner's contention, and found it was petitioner's decedent who was improperly and without excuse on the wrong side of the roadway. Instructions tendered by petitioner and given by the court informed the jury respondent's agent was negligent if he drove into the lane of traffic where the collision occurred, unless there was excuse therefor and, that it was incumbent upon respondent to produce evidence excusing its driver for being in the lane where the collision occurred. This burden respondent discharged and the answers to interrogatories left no doubt that the jury found a justifiable excuse for the action of respondent's agent. It was held in *Bass* v. *Dehner* (C.C.A. 10th 1939), 103 F. 2d 28, at page 34:

> "Where special findings by the jury show that plaintiff's intestate was not injured by an instruction, error therein is without prejudice."

(g) The decision of the Court is not in conflict with decisions of other jurisdictions.

The decision quoted by petitioner from the 4th Circuit, *Home Insurance Company* v. *Consolidated Bus Lines*, 179 F. 2d 768, involved a commentary on evidence by the trial judge which the Court of Appeals determined included statements:

> "that did not set out the testimony with complete accuracy." (p. 772.)

The decision in *Home Insurance Company* is not in conflict with the decision of the Seventh Circuit in this case; it is decided upon a different principle of law. The *Petzal* decision of the Court of Appeals for the District of Columbia is in complete harmony with the decision of the Seventh Circuit in this case, as is the holding of the Tenth Circuit in *Bass* v. *Dehner.*

The petitioner asserts that Title 28, U.S.C., Section 2111 and Rule 61 of the Federal Rules of Civil Procedure governing harmless error were improperly applied by the Court of Appeals in affirming the judgment of the trial court. Petitioner also asserts the decision of the Court of Appeals conflicts with decision of the Fourth, Seventh, Eighth and District of Columbia Circuits dealing with Appellate review of claimed prejudicial error resulting from failure to instruct on requested legal principles applicable to a party's theory of action.

Klas v. *Yellow Cab Company* (C.C.A. 7th 1939), 106 F. 2d 935, cited by petitioner, was not reversed on appeal and is, therefore not applicable. The decision of the Fourth Circuit in the *Home Insurance Company,* 179 F. 2d 768, case has been heretofore distinguished in this brief.

The Court of Appeals for the Eighth Circuit has applied the doctrine of harmless error where the general verdict of the jury is supported by substantial evidence regardless of claimed error in instructions given or refused. *Partlow* v. *Goldstein* (C.C.A. 8th 1959), 263 F. 2d 169 and *Luther* v. *Maple* (C.C.A. 8th 1958), 250 F. 2d 916, at page 921. Respondent has heretofore referred to the decision in *Lustine-Nicholson Motor Company* v. *Petzal* (U.S.C.A. D.C. 1959), 268 F. 2d 893, which accords with the decision of the Seventh Circuit in this case.

This court, on numerous occasions has considered questions of error in the charges of trial judges to juries. The responsibility of Appellate Courts in reviewing such questions has been clearly defined.

> "Once the judge has made an accurate and correct charge, the extent of its amplification must rest largely in his discretion." *U.S. v. Bayer*, 331 U.S. 535, 536, 67 S.Ct. 1394, 1396, 91 L.Ed. 1654.

It is respectfully suggested that the following statement of this court is really applicable to petitioner's argument:

> "Even now though the complaining party has filed an assignment of errors and submitted a written argument, it is by no means certain what the precise complaint is, unless it be that the verdict, in their view, is for the wrong party. Courts of error have nothing to do with the verdict of the jury, if it is general and in due form, except to ascertain, if they can, whether improper evidence was admitted to the jury or whether the jury was misdirected by the presiding judge." *First Unitarian Society of Chicago* v. *Faulkner* (1875), 91 U.S. 415, 423, 23 L.Ed. 283, 286.

Referring to the exact language of the Seventh Amendment and the right of any Appellate Court to reexamine facts found by the jury, this court has said that such facts:

> "cannot be retried 'in any court of the United States otherwise than according to the rules of the common law'. The only modes known to the common law 'to reexamine such facts, are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable, or the award of a *venire facias de novo* by the Appellate Court, for some error of law which intervened in the proceedings.'" *Chicago B. & Q. R. Co. v. Chicago* (1896), 166 U.S. 226 at p. 246, L.Ed. 919, at p. 988.

The trial judge did not see fit to grant petitioner's motion for new trial on hearing in that court. The Court of Appeals found no prejudicial error upon reviewing the evidence and the full charge made by the trial judge to the jury. That court determined that although the tendered instruction on "proper lookout" was a proper statement of the law, its refusal was "inconsequential" of the result under Indiana law. (Petitioner's Appendix A. p. 14.) The record clearly reflects the trial judge instructed the jury on the essential elements and theory of plaintiff's case, to-wit: that respondent's driver was guilty of negligence if he occupied the south-bound lane of travel without justification or excuse therefor. (Appellant's Appendix, pp. 10 to 12.) Petitioner's contention of error for failure of the trial judge to instruct on her theory of action is not substantiated by the record, *nor could the giving of instructions on the duty to maintain a proper lookout control the result of the jury's deliberation or findings of fact.*

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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